IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 22132 of 2006
To
SPECIAL CIVIL APPLICATION No. 22158 of 2006
With
SPECIAL CIVIL APPLICATION No. 24320 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

PRAVINKUMAR GOVINDLAL CHAVDA & 26 - Petitioner(s)
Versus
GUJARAT CANCER AND RESEARCH INSTITUTE & 2 - Respondent(s)

==========

Appearance :

MS SONAL R SHAH for Petitioner(s) : 1,
NANAVATI & NANAVATI for Respondent(s) : 1,
MR SUNIT SHAH GOVERNMENT PLEADER

WITH

MR. HUKUM SINGH, MR. VINAY PANDYA, MR. AMIT PATEL, MR. PRASHANT MANKAD, MS. SANDHYA NATANI AGPs for Respondent(s) : 2 - 3.

==========

CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 21/09/2007

ORAL JUDGMENT

1. Heard learned senior advocate Mr. Yatin Oza with learned advocate Ms. SR Shah appearing for petitioners, learned senior advocate Mr. SI Nanavati appearing for respondent no. 1 with learned advocate Mr. DG Shukla and learned Government Pleader Mr. Sunit Shah with AGP Mr. Vinay Pandya, Mr. Amit Patel, Mr. Hukum Singh, Mr. Prashant Mankad and Ms. Sandhya Natani appearing for respondent state authority.
2. In the present group of petitions, the prayer made by petitioners that holding the action of respondent authorities in not regularizing the services of the petitioners though they are by all means, eligible to be regularized in terms of experience and qualification, as illegal, arbitrary, perverse and violative of Art. 14 and 16 of the Constitution of India.
3. Further to direct the respondent authority to grant benefit of regularization to the

petitioners from the date of their initial appointment with all consequential and incidental benefits.

4. Further relief is to declare the action, respondent authority is arbitrarily and without giving an opportunity of hearing to petitioners putting the petitioners in fixed salary from their regular pay scale as unconstitutional and violative of provisions of the Constitution of India and direct the respondent authority to forthwith start giving work to the petitioners on their regular pay scale as was given at the time of their initial appointment with arrears of pay and all other consequential and incidental benefits raising therefrom.

5. Learned senior advocate Mr. Nanavati appearing for respondent institution submitted that in April 2007, respondent no. 1 has offer appointment as Badli Kamdar to each petitioners, but none reported for work.

6. He further submitted that today also

respondent no. 1 institution making same offer to petitioners to report for work as Badli Kamdar and respondent no. 1 institution will pay minimum wages for the days on which work is taken by respondent no. 1 from the petitioners.

7. Learned senior advocate Mr. Oza raising the objection about fixed salary or pay as offer by respondent no. 1.

8. The respondent no. 1 is institution having the grant from state government and question is whether this Court can direct the state authority or respondent institution to regularize the service of petitioners without following due process of recruitment Rules or not, which is not permissible in view of the larger bench decision of Apex Court in case of State of Karnataka Vs. Umadevi reported in 2006 (4) SCC 1.

9. By the decision of Apex Court what was earlier law laid down by Apex Court, for that specific observation made by Apex Court in

para 54, which is quoted as under:

“It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents.

Meaning thereby that now the Court has to follow decision of Apex Court given by larger bench, where it is specifically made clear that High Court should not issue such directions unless recruitment itself was made regularly in terms of constitutional scheme. The financial economy impact in such directions has also one of the relevant factor. A vide powers under Art. 226 has not intended to be used for issuance of such directions. The Court may not interfere in such economic/financial arrangement.

Recently, in case of Post Master General Kolkatta Vs. Tutu Das (Dutta) reported in 2007(2) SCC (L&S) 179 Apex Court has observed as under:

" What was considered to be permissible at a given point of time keeping in view the decisions of the Supreme Court which had then been operating in the field, does no longer hold good. Indisputably, the situation has completely changed in view of a large number of decisions rendered by the Supreme Court in the last 15 years or so. It was felt that no appointment should be made contrary to the statutory provisions governing recruitment or the rules framed in that behalf under a statute or Article 309 proviso of the Constitution. The equality clause contained in Articles 14 and 16 of the Constitution must be given primacy. No policy decision can be taken in terms of Articles 77 or Article 162 of the Constitution which would run contrary to the constitution or statutory schemes. No regularization is, thus, permissible in exercise of the power conferred under Article 162 of the Constitution if the appointments have been made in contravention of the statutory rules.

The completion of 240 days of continuous service in a year would be attracted only in a case where retrenchment has been effected without complying with the provisions contained in Section 25(F) of the Industrial Disputes Act, but would not be relevant for regularization of service.

Madhyanuk Shiksha Parishad V. Anil Kumar Mishra, (2005) 5 SCC 122 : 2005 SCC (L&S)628: AIR 1994 SC 1638, relied on

" Equality is a positive concept. Therefore, it can not be invoked where any illegality has been committed or

where no legal right is established. Hence, the fact that a similarly situated person was granted regularization does not advance the case of the respondent.

Even otherwise the Supreme Court is bound to a large number of recent decision which had been rendered by the Supreme Court. The statement of law contained in para 53 of Umadevi (3) can not be invoked in this case

(SEE: State of Karnataka v. Umadevi (3), 2006 4 SCC 1; 2006 SCC (L&S) 753; A Umarani V. Registrar, coop Societies, (2004) 7 SCC 112: 2004 SCC (L&S) 918; State of Maysore V. S.V. Narayanappa, AIR 1967 SC 1071; R.N.Nanjudappa v. T. Thimmiah, (1972) 1 SCC 409; B.N. Nagarajan V. State of Karnataka (1979) 4 SCC 507 : 1980 SCC (L&S) 4; Punjab Water supply & Sewerage Board V, Ranjodh Singh, (2007) 2 SCC 491: (2007) 1 SCC (L&S) 713 :(2006) 13 Scale 426; National Fertilizers Ltd. V. Somvir Singh, (2006) 5 SCC 493: 2006 SCC (L&S) 1152; State of M.P. V. Yogesh Chandra Dubey, (2006) 8 SCC 67 : 2006 SCC (L&S) 1797; State of M.P. Vs. Lalit Kumar Verma, (2007) 1 SCC 575: (2007) 1 SCC (L&S) 405: (2006) 12 Scale 642; Punjab State Warehousing Corpn. V. Manmohan Singh, (2007) 9 SCC 337: (2007) 3 Scale 401, followed.

Recently, in case of Mahadeo Bhau Khilare (MANE) and others Vs. State of Maharashtra reported in 2007 SCC (L & S) 194 the Apex Court has observed as under. Relevant para 7, 8 and 9 are quoted as under:

7. “Indisputably, the State of Maharashtra has framed recruitment rules. Any scheme by way of an executive instruction in terms of Article 162 of the Constitution of India, if violative of such statutory rules would not be legally sustainable.
(See: A Umarani V. Registrar, Coop Societies reported in (2004) 7 SCC 112, 2004 SCC (L&S) 918).

8. The question in regard to the existence of any vested legal right, inter alia, is such by above appointees and/or daily wagers, to be absorbed/regularized in the State services came up for consideration before a Constitution Bench of this Court in Secy State of Karnataka Vs. Umadevi reported in (2004) 7 SCC 1.

9. It was categorically held therein that regularization in service, in cases where the appointments were viod ab intio, having been made in utter disregard of the existing recruitment rules and/or constitutional scheme adumberated under Articles 14 and 16 of the Constitution of India would be wholly illegal and thus the direction in this behalf can be issued.
(See: Punjab Water Supply & Sewerage Board Vs. Ranodh Sing reported in (2007) 2 SCC 491 and in case of Punjab State Warehousing Corpn Vs. Manmohan Singh reported in (2007) 9 SCC 337.)

The Apex Court has also taken view in case of U.P.Power Corporation Ltd. & Another Vs. Bijli Mazdoor Sangh and others reported in (2007) 2 SCC (L&S) 258. Relevant para 4,

5, 6, 7, and 8 are quoted as under:

4. In support of the appeal, learned counsel for the appellants submitted that the order of the High Court is clearly untenable being cryptic. In any event in view of the decision in Secy., State of Karnataka v. Umadevi reported in (2006) 4 SCC 1, the direction for regularization could not have been given. It was pointed out that the Tribunal relied on a decision of this Court which was specifically overruled in Umadevi (3) case.

5. On the other hand learned counsel for the respondent submitted that in Umadevi (3) case the powers of the industrial adjudicator were not under consideration. There is a difference between a claim raised in civil suit or a writ petition and one adjudicated by the industrial adjudicator. It was submitted that the Labour Court can create terms existing in the contract to maintain industrial peace and therefore, it can very the terms of the contract. Therefore, it was submitted that the orders of the High Court do not warrant any interference.

6. It is true as contended by learned counsel for the respondent that the question as regards the effect of the industrial adjudicators' powers was not directly in issue in Umadevi (3) case. But the foundational logic in Umadevi (3) cases is based on Article 14 of the Constitution of India. Though the industrial adjudicator can very the terms of the contract of the employment, it

cannot do something which is violative of Article 14. If the case is one which is covered by the concept of regularization, the same cannot be viewed differently.

7. The plea of learned counsel for the respondent that at the time the High Court decided the matter, decision in Umadevi (3) case was not rendered is really of no consequence. There can not be a case for regularization without there being employee - employer relationship. As noted above the concept of regularization is clearly linked with Article 14 of the Constitution. However, if in a case the fact situation is covered by what is stated in para 45 of Umadevi (3) case the industrial adjudicator can modify the relief, but that does not dilute the observations made by this Court in Umadevi (3) case about regularization.

8. On fact it is submitted by learned counsel for the appellants that respondent 2 himself admitted that he never worked as a pump operator, but was engaged as daily labourer on daily wage basis. He also did not possess the requisite qualification. Looked at from any angle, the direction for regularization, as given could not have been given in view of what has been stated in Umadevi (3) case."

10. In view of the above observations made by Apex Court as referred above, relief which has been prayed in this petitions

can not be granted while exercising the power under Art. 226 of the Constitution of India.

11. However, respondent institution is industry and petitioners are employees or workmen covered by the difination of Workmen under Section 2(S) of I. D. Act 1947. The respondent is industry within a meaning under Section 2(J) of I. D. Act 1947. Therefore, it is open for the petitioner to raise industrial dispute about the grievance raised in present petitions under the Machinery of the Industrial Dispute Act 1947.

12. As and when such dispute will be raised by concerned authority consider it and pass appropriate orders in accordance with law, but this Court can not interfere in such matter to direct the respondent institution to regularize the service of petitioners dehore the recruitment rules.

Relevant aspect has been considered by Bombay High Court in case of Babu Bhikhaji Shinde Vs. Maharashtra State Handlooms Corporation Limited, Nagpur & others. reported in 2007 III CLR 244. Relevant para 16, 17, and 18 are quoted as under:

> **16. The counsel for the Respondent has also made a statement that there are about 38 petitions pending before the Nagpur Bench and few matters, raising similar challenge, before this Bench. It was also pointed out that some matters of similar nature are also pending at various Labour Courts. In this view of the matter, it is contended that it cannot be said that the petitioner has made out any special case for entertaining the petition without availing alternate remedy before an appropriate forum. Reliance is placed on a reported judgment in the case of Uttaranchal Forest Development Corporation and Anr. V. Jabar Singh and Ors. Reported in 2007 (3) MH. L.J. 345, wherein it has been laid down that:**
>
> **" In the instant case, the workmen have not made out any exceptional circumstances to knock the door of the High Cort straightway without availing the effective alternative remedy available under the Industrial Disputes Act. But the dispute relates to enforcement of a right or obligation under the statute and a specific remedy is, therefore, provided under the statute. The High Court should not deviate from the general view and interfere under Article 226 of the Constitution except when a very strong case is made out for making a departure. There are several decisions to the same**

effect. The respondents have not made out any strong case for making a departure. Accordingly, the conclusion is inevitable that the High Court was not justified in entertaining the writ petition.

We are, therefore, of the opinion that the writ petitioners (the respondents herein) who have not invoked the jurisdiction of the Tribunal are not entitled to any relief of reinstatement, back wages and continuity of service in view of our finding that the appellant Corporation is an industrial establishment and that provisions of Section 25-N of the Industrial Disputes Act are attracted."

17. Further reliance is placed on a judgment in the case of U.P. State Spinning Co. Ltd. v. R. S. Pandey and another, reported in (2005) 8 SCC 264, wherein it has been observed:

" In a catena of decisions it has been held that writ petition under Article 226 of the Constitution should not be entertained when the statutory remedy is available under the Act, unless exceptional circumstances are made out."

18. Learned Counsel for the petitioner has invited out attention to a reported judgment in the case of Hanumansingh s/o Laxmansingh Thakur v. Municipal Council, Malkpur and others, reported in 1989 1 CLR 696 Bom. : 1989 (2) Bom. Cases reporter, 129 and more particularly to the observations made in para 15 of the judgment, which reads:

" It is true that normally the High

Court does not in its discretion entertain a writ petition under Article 226 of the Constitution where there exists an adequate alternative remedy. The question, therefore, has to be decided in the facts of each case in regard to the exercise of the discretion by the High Court under Article 226 on the question whether parties should be relegated to their statutory remedies or whether the High Court should entertain the writ petition and decide the same."

13. However, considering the submissions made by learned senior advocate Mr. Nanavati, it is open for the petitioners to report for work as offered by respondent institution if they so desire.

14. However, learned advocate Mr. Oza submitted that this petitioners were worked with respondent institution since more than ten years and initially they were getting regular scale from respondent institution. Therefore, he submitted that petitioners are entitled for regular scale then petitioners are prepared to report for duty in respect to

offer given by respondent institution.

15. However, aforesaid submissions made by learned senior advocate Mr. Oza has been denied and disputed by learned senior advocate Mr. Nanavati. He submitted that respondent institution is denied the factual aspect which has been narrated by learned advocate Mr. Oza in para 4.13 and para 8 are quoted as under :

> **4.13 I say that not a single petitioner has completed 240 days in a calendar year during their tenure as Badli/temporary daily wager employees. There are about 55 Badli/temporary daily wager employees who are engaged as per the exigency of work. The present petition is filed by only 27 Badli/temporary daily wager employees and if their petition is entertained and if this Honourable Court grants any relief or benefit to the present petitioners, then several senior employees would be adversely affected and without joining them as necessary parties in the present petition, the present petition can not be entertained by this Court Court as the present petition is barred by non joiner of necessary parties.**
>
> **8.With reference to the contents of**

paragraph 3 of the petition, it is denied that the petitioners have put merely 9 to 10 years of services as "badli" worker with the respondent and have been continuous with the respondent institute and that there ample vacancy in the respondent institution for regularizing the services of the petitioners in the scale (Pay-scale) as was given to the date of initial appointment and without any justification from June 2006 onwards had started giving the petitioners fixed salary of Rs. 2000/- per month and that the action of the respondent stopped giving work to the petitioners even as "badli" worker on the petitioners raising objection to being paid fixed salary without any rhyme or reasons instead of the scale and that the respondent authorities even without intimating the petitioners or without any justification or even without stopped giving the work to the petitioners even as "badli" workers and that stopped giving work to the petitioners, is not only arbitrary, perverse and illegal but is violative of Art 16 of the Constitution of India in as much as as deprives an employees of his legitimate right being regularized and being paid to the salary since his appointment and that the respondent authorities are now outsourcing the same work as is carried out by the petitioners by giving contracts to private parties to carry out the same work as is carried out by the Petitioners and thereby depriving the Petitioners of their legitimate rights to be given

work.

I say that the respondent Hospital has neither terminated the services of the petitioners nor relieved them from the services of the Respondent Hospital. The Respondent Hospital has given contract for different jobs since several years which is legally permissible under the provisions of the Contract Labour (Regulation and Abolition) Act, 1970. The Petitioners can approach the authorities under the said Act for such grievances but cannot approach directly to this Honourable Court as alternative efficacious remedy is available to them."

16. The offer is made by the respondent institution to petitioners, it is their own decision to accept it or not to accept it, but petitioners can raise same grievance under the Machinery of I. D. Act 1947, which may be considered to be effective, meaning thereby for redressing the grievance voiced in the present petitions. Learned senior advocate Mr. Nanavati also submitted that in identical matter this Court is disposed of matter without issuing the notice to other side in SCA no. 17207 with 17323 of 2007

dated 1/8/2007 where termination is under challenged.

17.I have considered the pleading between parties. Looking the pleadings between parties which are on record it revels disputed question of facts and law. This Court cannot decide disputed question of facts while exercising power under Art. 226 of the Constitution of India. In such circumstances, the alternative Industrial forum is effective remedy where petitioners are able to get relief after proper adjudication of Industrial disputes by Industrial Tribunal or Labour Court. Therefore, also writ petitions are not entertained/maintainable.

(See: AIR 2006 SC 2016 in case of Sanjay Sitaram Khemka Vs. State of Maharashtra & Ors, 2006 12 GHJ 564 Guj DB in case of Hemant Automobiles Pvt. Ltd. & Anr. Vs. Union of India, 2006 13 SCALE 556 in case of Uttaranchal Forest Development Corpn & Anr Vs. Jabar Singh and Ors, 2006 AIR SCW 5782 in case of Star Paper Mills Ltd Vs. State of U.P.)

18.Considering the aforesaid statement made by

learned advocate Mr. Nanavati and considering the decisions of Apex Court larger bench as referred above this Court is not entertaining this petition. This nature of petitioners are also not maintainable in law. Accordingly, this petitions are dismissed. No order as to costs.

(H.K.RATHOD, J)

asma